

Ethics briefing for employees in an organization that is the subject of an A-76 cost study

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Overview (1)

- **Rules on post-government employment**
 - **One-year compensation ban**
 - **Lifetime representation ban**
 - **Relationship to right-of-first-refusal**
- **Rules on seeking employment with a company**
 - **General rules**
 - **How the rules apply to people participating (in a personal & substantial way) in the A-76 study**
 - **How the rules apply to people not participating (in personal & substantial way) in the A-76 study**
 - **Using govt. resources in support of job hunting**

Overview (2)

- **Rules on obtaining and disclosing information**
 - **The ban on obtaining procurement information**
 - **The ban on disclosing procurement information**
 - **The ban on disclosing non-public information**
 - **Assisting a contractor in preparing its proposal**
- **Communicating with Members of Congress**
 - **Acting as a private citizen**
 - **Acting as a representative of the Air Force**
 - **Conclusions**

Post-Government Employment -- 1-Year Compensation Ban (41 USC 423(d))

- **People who serve in one of seven positions, or who make one of seven types of decisions, on a contract over \$10 million, may not accept compensation from the contractor for 1 year**
- **1-year ban is on accepting compensation from the contractor as an employee, consultant, officer or director**
- **Ban can apply to officers, enlisted & civilians**

Post-Government Employment -- Positions Resulting in 1-Year Comp. Ban

- **Procuring Contracting Officer**
- **Source Selection Authority**
- **Member of Source Selection Evaluation Board**
- **Chief of financial or technical evaluation team**
- **Program Manager**
- **Deputy Program Manager**
- **Administrative Contracting Officer**

Post-Government Employment -- Decisions Resulting in 1-Year Comp. Ban

- **Decision to award a contract over \$10 million**
- **Decision to award a subcontract over \$10 million**
- **Decision to award a modification that is over \$10 million of a contract or subcontract**
- **Decision to award a task order or delivery order over \$10 million**

Post-Government Employment -- Decisions Resulting in 1-Year Comp. Ban

- **Decision to establish overhead or other rates applicable to a contract or contracts valued over \$10 million**
- **Decision to approve issuance of a contract payment or payments over \$10 million**
- **Decision to pay or settle claim over \$10 million**

One-Year Comp. Ban -- Conclusions

- **If the A-76 process results in the award of a contract over 10 million dollars to a contractor:**
 - **Employees who served in one of the seven positions, or who made one of the seven decisions, will be prohibited from working for the contractor for one year**
 - **All other employees may work for contractor**
- **Participating on PWS team or MEO team does not, by itself, result in one-year comp. ban**

Post-Government Employment -- Lifetime Representation Ban

- **If you participate personally & substantially in a contract or procurement, after one or more non-govt. parties have become involved in the matter:**
- **You may go to work for the contractor**
 - **You may help contractor perform the contract**
 - **But you may never act as contractor's negotiator or spokesperson on the contract in any adversarial or disputed situation (18 USC 207(a)(1))**
- **"Participate" includes making decisions, giving advice, making recommendations or evaluations; the ban does not apply to enlisted personnel**

Post-Government Employment -- Conclusions on Lifetime Representation Ban

- **Employees who do the technical evaluations of the proposals, or who make the award decision, probably will be subject to the ban**
- **Employees who write the Performance Work Statement (PWS) or Most Efficient Organization (MEO) may be subject to the ban, depending on the circumstances**
- **Employees whose only involvement in the process is to furnish factual information that is used in creating PWS or MEO will not be subject to ban**

Post-Government Employment -- Relationship to Right-of-First- Refusal (1)

- **If the A-76 study results in the workload being awarded to a contractor, the contractor must give to the adversely affected Federal employees the right-of-first-refusal for employment openings under the contract (FAR 7.305)**
- **If the workload is awarded to a contractor, and you are given a right-of-first-refusal for employment openings under the contract, does this mean that the post-government employment restrictions do not apply?
Answer: No.**

Post-Government Employment -- Relationship to Right-of-First- Refusal (2)

- **The right-of-first-refusal clause reads as follows: “The Contractor shall give Government employees who have been or will be adversely affected or separated as a result of award of this contract the right of first refusal for employment openings under the contract in positions for which they are qualified, if that employment is consistent with post-Government employment conflict of interest standards.” (FAR 52.207-3)**
- **Thus, you can take advantage of the right-of-first-refusal clause, only if doing so would not violate the post-government employment rules.**

Job Hunting Rules -- Overview

- **General rules on seeking employment**
 - **Can't work on matters affecting co's fin. interests**
 - **The requirement to report employment contacts**
 - **The two ways to respond to employment contact**
- **How the rules apply to people who are participating (in a personal & substantial way) in the A-76 source selection**
- **How the rules apply to people who are not participating (in a personal & substantial way) in the A-76 source selection**
- **Using govt. resources in support of job hunting**

Job Hunting -- Ban on Working on Matters Affecting Company's Financial Interests

- **You may not “seek employment” with a company if you are currently participating personally & substantially in any government matter that has a direct and predictable effect on the company's financial interests. (5 CFR 2635.604(a))**
- **You start “seeking employment” when:**
 - **You have a discussion about employment, OR**
 - **You submit a resume. (5 CFR 2635.603(b)(1))**
- **Example of a government matter that can affect a company's financial interests: an A-76 study (and whether or not the company wins the workload)**

Job Hunting -- Requirement to Report Employment Contacts (41 USC 423(c))

If an employee (officer, enlisted or civilian) is --

- Participating personally & substantially in a procurement, and**
- Contacts, or is contacted by, a bidder or offeror regarding possible employment,**

then the employee must --

- Give written report to supervisor & Designated Agency Ethics Official or designee, and**
- Either (1) reject the possibility of employment, or (2) be disqualified from working on procurement until job discussions end and there is no arrangement for employment**

Job Hunting -- Requirement to Report Employment Contacts

- **Rule applies only to contracts in excess of simplified acquisition threshold (\$100,000)**
- **Rule applies only to employment contacts from a “bidder or offeror” -- therefore:**
 - **Rule applies if you are contacted by a company that has submitted a proposal**
 - **Rule does not apply if you are contacted by a company that has not submitted a proposal**

Responding to an Employment Contact (1)

- **Legally speaking, there are only two ways one can respond to an employment contact:**
 - **Reject the possibility of employment, and**
 - **Any response other than that**
- **If you reject the possibility of employment (“No, thank you, I’m not interested”), then:**
 - **You are not considered to be seeking employment with the company, and**
 - **You may continue to work on govt. matters that affect the company’s financial interests**

Responding to an Employment Contact (2)

- **Examples of responses to an employment contact (other than rejection) include:**
 - **Accepting the job offer (“I’ll start tomorrow.”)**
 - **Gathering information (“What is the salary?”)**
 - **Deferring discussions (“Let’s talk next month.”)**
- **If you respond to an employment contact in any way other than rejection, then:**
 - **You are considered to be seeking employment with the company, and**
 - **You must stop working on government matters that affect the company’s financial interests**

People who are Participating (in a Personal & Substantial Way) in an A-76 Source Selection

- **You are considered to be participating (in a personal & substantial way) in the A-76 source selection if you are serving:**
 - **As the contracting officer, source selection authority, or manager of the source selection**
 - **On the MEO team**
 - **On the PWS team**
 - **On the technical evaluation team**
 - **On the cost evaluation team**

People with Substantial Participation -- Contacting a Company

- **Generally speaking, many companies express interest before proposals are due, while a smaller number of companies actually submit proposals**
- **If you are participating (in a personal & substantial way) in the A-76 source selection, you may not seek employment from:**
 - **Any company that has expressed interest in competing for the workload (before proposals are due), or**
 - **Any company that has submitted a proposal (after proposals are due)**

People with Substantial Participation -- Getting Contacted by a Company

- **If you are participating (in a personal & substantial way) in an A-76 source selection, and a company that is interested in the source selection contacts you about a post-govt. job, the rules on what you may/must do depend on (1) whether or not the company has submitted a proposal, and (2) whether or not you rejected the possibility of employment**
- **The 4 possibilities (covered in the next 4 slides) are:**
 - **No proposal submitted--you reject job opportunity**
 - **No proposal submitted--you don't reject job oppor.**
 - **Proposal is submitted--you reject job opportunity**
 - **Proposal is submitted--you don't reject job oppor.**

People with Substantial Participation -- Getting Contacted by a Company that has not Submitted a Proposal (1)

- **If you are participating (in a personal & substantial way) in A-76 source selection, and you are contacted about post-government employment by a company that has not submitted a proposal, and you reject the possibility of employment, then:**
 - **You may continue to participate (in a personal & substantial way) in the A-76 source selection, and**
 - **You are not required to report the employment contact to anyone (although you may do so)**

People with Substantial Participation -- Getting Contacted by a Company that has not Submitted a Proposal (2)

- **If you are participating (in a personal & substantial way) in A-76 source selection, and you are contacted about post-govt. employment by a company that has not submitted a proposal, and you do anything other than reject the possibility of employment, then:**
 - **You must stop participating (in a personal & substantial way) in the A-76 source selection, and**
 - **You must tell your supervisor that you can't work on the source selection, so you can be assigned other duties (5 CFR 2635.604(b))**

People with Substantial Participation -- Getting Contacted by a Company that has Submitted a Proposal (1)

- **If you are participating (in a personal & substantial way) in an A-76 source selection, and you are contacted about post-government employment by a company that has submitted a proposal, and you reject the possibility of employment, then:**
 - **You may continue to participate (in a personal & substantial way) in the A-76 source selection, and**
 - **You must give a written report of the contact to your supervisor & to designated agency ethics official or designee (JA can tell you who this is)**

People with Substantial Participation -- Getting Contacted by a Company that has Submitted a Proposal (2)

- **If you are participating (in a personal & substantial way) in A-76 source selection, and you are contacted about post-government employment by a company that has submitted a proposal, and you do anything other than reject the possibility of employment, then:**
 - **You must stop participating (in a personal & substantial way) in the A-76 source selection, and**
 - **You must give a written report of the contact to your supervisor & to designated agency ethics official or designee (JA can tell you who this is)**

People who are not Participating (in a Personal & Substantial Way) in the A-76 Source Selection

- **You are not considered to be participating (in a personal & substantial way) in the A-76 source selection if:**
 - **Your only involvement in the source selection is (1) providing factual information that is used by others to create the PWS or MEO, or (2) providing technical or admin. support, OR**
 - **You have no involvement in the source selection**

People without Substantially Participation

- If you are not participating (in a personal & substantial way) in the A-76 source selection, rules on contacting a company (or getting contacted), depend on if you have any govt. duties involving the company.
- The 4 possibilities (covered in the next 4 slides) are:
 - You want to contact the company, and you do not have government duties involving the company.
 - You want to contact the company, but you do have government duties involving the company.
 - The company contacts you, and you do not have government duties involving the company.
 - The company contacts you, but you do have government duties involving the company.

People without Substantial Participation -- Contacting a Company (1)

- **If you're not participating (in a personal & substantial way) in the A-76 source selection, and you would like to seek employment with a company that has expressed interest in competing for the work-load (or that has already submitted a proposal), and you do not have any government duties involving the company unrelated to the A-76 study, then:**
 - **You may seek employment with the company,**
 - **You may allow the company to use your resume as part of its proposal (OGE Letter 98x5), and**
 - **You don't have to tell supervisor (but you can)**

People without Substantial Participation -- Contacting a Company (2)

- **If you're not participating (in a personal & substantial way) in the A-76 source selection, and you would like to seek employment with a company that has expressed interest in competing for the workload (or that has submitted a proposal), and you have govt. duties involving the company, then:**
 - **You may seek employment with the company, and you may allow the company to use your resume as part of its proposal (OGE Letter 98x5)**
 - **But you must first get disqualified (in writing) from your govt. duties involving the company --JA has a form disqualification letter you can use**

People without Substantial Participation -- Getting Contacted by a Company (1)

- **If you're not participating (in a personal & substan-tial way) in the A-76 source selection, and you are contacted about post-govt. employment by a company that has expressed interest in competing for the workload (or that has submitted a proposal) and you do not have any govt. duties involving the company unrelated to the A-76 study, then:**
 - **You may discuss employment with the company**
 - **You may allow the company to use your resume as part of its proposal (OGE Letter 98-5), and**
 - **You don't have to tell supervisor (but you can)**

People without Substantial Participation -- Getting Contacted by a Company (2)

- **If you're not participating (in a personal & substantial way) in the A-76 source selection, and you are contacted about post-govt. employment by a company that has expressed interest in competing for the workload (or that has submitted a proposal) and you have govt. duties involving the company, then:**
 - **You may seek employment with the company, and you may allow the company to use your resume as part of its proposal (OGE Letter 98x5)**
 - **But you must first get disqualified (in writing) from your govt. duties involving the company --JA has a form disqualification letter you can use**

People without Substantial Participation -- Consequences of Seeking Employment

- **Once you begin to seek employment with a company interested in the A-76 workload, you may not participate (in any personal & substantial way) in the A-76 procurement, i.e., you are removing yourself from pool of people who can work on the procurement (in a personal & substantial way)**
- **The ban on participating (in a personal & substantial way) in the A-76 procurement lasts until:**
 - **The company is no longer competing for A-76 workload, i.e., they don't submit a proposal, OR**
 - **You reject them as employment possibility (or vice versa), & employment discussions are over**

Job Hunting -- Using Govt. Resources (1)

- **General rule**: Government resources may be used only for authorized purposes (5 CFR 2635.704(a)) and employees are generally not authorized to use govt. resources to help them find post-govt. employment.
- **Exception**: A base office with a mission of helping employees find employment (transition assistance office) may use govt. resources for that purpose.
- **Exception**: Government communication systems & certain other equipment may be used in support of “job searching in response to Federal Government downsizing,” if certain conditions are met. (JER ¶ 2-301; AFI 33-119, 1 Mar 99, ¶ 3.3.2.)

Job Hunting -- Use of Govt. Resources (2)

- **An employee whose position is the subject of an A-76 source selection may use government e-mail, internet, and computer in support of a job search, if his or her supervisor determines that:**
 - **No adverse effect on performance of duties,**
 - **Use is of reasonable duration & frequency, and done on personal time (lunch/after duty hours),**
 - **Use serves a legitimate public interest (such as job search in response to govt. downsizing),**
 - **Use does not reflect adversely on Air Force,**
 - **Use does not overburden the system, and**
 - **Use does not create significant additional cost**

Job Hunting -- Use of Govt. Resources (3)

- **Supervisor can approve use of govt. e-mail, inter-net & computer for job search only if he or she is:**
 - **A civilian employee GS-12 or above, or**
 - **A commissioned military officer (JER 1-202)**
- **Use of govt. e-mail, internet & computer for job searching must not create “significant additional cost to DoD” -- this means use your own paper**
- **In support of your job search, you may not:**
 - **Make L/D calls at govt. expense (JER 2-301)**
 - **Use services of subordinates (JER 3-305b)**

Disclosing or Obtaining Information -- The Three Basic Rules

- **The ban on obtaining source selection information or contractor bid or proposal information (41 USC 423(b))**
- **The ban on disclosing source selection information or contractor bid or proposal information (41 USC 423(a))**
- **The ban on disclosing non-public information to further your own (or someone else's) private interests (5 CFR 2635.703)**

Ban on Obtaining Procurement Information (41 USC 423(b))

- **The Procurement Integrity law provides that a person may not knowingly obtain “source selection information” or “contractor bid or proposal information” before contract award, except as provided by law**
- **The ban applies to everyone, including Federal employees & contractor employees**

Ban on Disclosing Procurement Information (41 USC 423(a))

- **The Procurement Integrity law prohibits the unauthorized disclosure, before contract award, of:**
 - **Source selection information, OR**
 - **Contractor bid or proposal information**
- **The ban applies to:**
 - **Current and former Federal employees, &**
 - **Anyone who is advising or has advised the U.S. Government regarding the procurement (i.e., contractor employees & consultants)**

Definition of Source Selection Information (1)

- **“Source selection information” means any of ten types of information (41 USC 423(f)(2)) :**
 - (1) Bid prices submitted by bidders**
 - (2) Costs or prices submitted by offerors**
 - (3) Source selection plans**
 - (4) Technical evaluation plans**
 - (5) Technical evaluations of proposals**
 - (6) Cost or price evaluations of proposals**
 - (7) Competitive range determinations**
 - (8) Rankings of bids, proposals or competitors**

Definition of Source Selection Information (2)

- **“Source selection information” means:**
 - (9) Reports & evaluations of source selection**
 - panels, boards or advisory councils,**
 - (10) Other information, if:**
 - (A) The head of agency or designee, or the contracting officer, has determined that its disclosure would jeopardize integrity of the procurement, and**
 - (B) It is marked with “Source Selection Information -- See FAR 3.104”**

Definition of Contractor Bid or Proposal Information (41 USC 423(f)(1))

- **“Contractor bid or proposal information” means any of five types of information:**
 - **Cost or pricing data**
 - **Indirect costs & direct labor rates**
 - **Proprietary information about manufacturing processes, operations or techniques marked by the contractor IAW applicable law or reg.**
 - **Information marked by the contractor as “contractor bid or proposal information,” or**
 - **Information marked by the contractor IAW FAR clause 52.215-12, entitled “Restriction on Disclosure and Use of Data”**

Penalty for Disclosing/Obtaining Information

-- For Money or Competitive Advantage

- **If an individual improperly discloses or obtains source selection information, or contractor bid or proposal information,**
 - **In exchange for anything of value, or**
 - **In order to obtain for himself, or give to anyone else, a competitive advantage in the award of a Federal contract,**
- the maximum penalty is:**
- **Five years in prison,**
 - **Civil penalty of \$50,000 for each violation &**
 - **Adverse personnel action (i.e., termination)**

Penalty for Disclosing/Obtaining Information

-- Not for Money or Competitive Advantage

- **If an individual improperly discloses or obtains source selection information, or contractor bid or proposal information, in violation of the Procurement Integrity law (but not in exchange for anything of value, or to give anyone a competitive advantage in the award of a Federal contract), the maximum penalty is:**
 - **Civil penalty of \$50,000 for each violation &**
 - **Adverse personnel action (i.e., termination)**

Improper Use of Non-Public Information (1)

- **Improper disclosure.** An Executive Branch employee may not disclose non-public information in order to further her own private interests, or the private interests of another (such as a contractor). (5 CFR 2635.703(a))
- **Improper use through advice or recommendation.** An Executive Branch employee may not improperly use his knowledge of non-public information in giving advice or recommendations, in order to further his own private interests, or the private interests of another (such as a contractor). (5 CFR 2635.703(a))

Improper Use of Non-Public Information (2)

- **“Non-public information” means information that you gain by reason of your Federal employment, and that you know (or reasonably should know) has not been made available to the general public.**
- **Example: Disclosing non-public information to a company competing for the A-76 workload in order to help it win the workload would be a violation.**
- **Example: Using your knowledge of non-public information to give advice to a contractor that is competing for the A-76 workload on how to prepare its proposal would be a violation, even if you don’t actually tell them any non-public info.**

Assisting Contractor in Preparing Proposal (1)

- If a contractor interested in competing for the A-76 workload asks you to help it prepare its proposal, can you do so? Answer: No.**
- You work in the organization that is the subject of the A-76 study & have invaluable knowledge about how things get done. This is non-public info. since it is not available to all the competing companies.**
- If you use your knowledge of “non-public information” in helping a contractor prepare its proposal, you will be in violation of the ban on using “non-public information” to further a company’s private interests.**

Assisting Contractor in Preparing Proposal (2)

- **If a contractor asks you to review its proposal and make suggestions, and you are able to do so in a way where you don't disclose any non-public information, and you don't use any non-public information In giving your advice, you would not violate the rule on misusing non-public info.**
- **However, if the company you assist wins the workload, and the unsuccessful competitors find out you helped the company with its proposal, they could file a bid protest alleging "unfair competitive advantage," and you could be asked to testify at the bid protest hearing about every piece of advice you gave to the contractor.**

Communicating with Members of Congress -- Acting as A Private Citizen

- **“No person may restrict a member of the armed forces in communicating with a member of Congress or an Inspector General.” (10 USC 1034(a))**
- **“Air Force personnel have the legal right to petition, furnish information to, or communicate with the Congress.” (Air Force Instruction (AFI) 90-401, 1 July 1998, ¶ 1.5)**
- **The right to communicate with Congress applies to communications in your personal capacity**

Communicating with Members of Congress -- Acting as a Representative of the Air Force

- **There are certain organizations that are responsible for communicating on behalf of the Air Force with Members of Congress**
- **The Office of Legislative Liaison (SAF/LL) is responsible for keeping Members of Congress advised about AF activities (AFI 90-401, ¶ 3.2.3.)**
- **In AFMC, HQ AFMC/XPP is responsible for working with SAF/LL on matters of interest to Members of Congress (AFI 90-401, AFMC Supplement, 1 March 1996, ¶ 5.1.4.)**

Communicating with Members of Congress -- Conclusions

- **Employees have the right to communicate with Members of Congress about an A-76 study, as long as they are speaking on behalf of themselves, and not on behalf of the Air Force.**
- **Supervisors should not prohibit or discourage employees from exercising this right.**
- **When communicating with Members of Congress, employees must be careful not to violate any of the rules on disclosing information.**